

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA  
NORTHERN DIVISION

US BEVERAGE, INC.,  
Plaintiff,

vs.

JOHN BUSTER WALKER,  
II, and TRIDENT  
MARKETING, INC.,  
Defendants.

CIVIL ACTION NO.

2:06-CV-496-SRW

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JOHN BUSTER WALKER,  
II, and TRIDENT  
MARKETING, INC.,  
Counterclaim  
Plaintiffs,

vs.

US BEVERAGE, INC.,  
Counterclaim  
Defendant,

and  
GRADY DOWLING  
KITTRELL, THOMAS GOIN  
CLARK, III, and  
NORMAN "BUDDY" TODD,  
Third Party  
Defendants.

\* \* \* \* \*

**DEPOSITION OF THOMAS GOIN CLARK, III,**  
taken pursuant to notice and stipulation on  
behalf of the Defendants/Counterclaim  
Plaintiffs, in the Law Offices of Copeland,  
Franco, Screws & Gill, 444 South Perry Street,  
Montgomery, Alabama, before Tiffany B.  
Beasley, Certified Court Reporter and Notary  
Public in and for the State of Alabama at  
Large, on November 16, 2006, commencing at  
8:57 a.m.

1 A. I don't recall.

2 Q. What do you recall about the proposal to sell  
3 Juice Alive to day care centers?

4 A. I recall that -- there being some arrangement  
5 where John and Ryan Hamner would create a  
6 market for our day care product on the  
7 Internet.

8 Q. And what was the day care product? Just  
9 describe it.

10 A. It was a hundred percent seven-plus-one juice.  
11 Hundred percent juice. Mixed ratio was  
12 seven-plus-one.

13 Q. And this juice, would this be a frozen slush  
14 or just a --

15 A. It's the -- it's the same juice as the frozen  
16 slush, but it was just juice for -- sold in a  
17 juice -- I mean, sold the exact same way,  
18 packed the exact -- the exact same -- or  
19 similar way. Just not frozen. The end user  
20 didn't freeze it.

21 Q. Who brought up this proposal to sell the day  
22 care juice under the Juice Alive name?

23 A. I believe John and Ryan.

1 A. Gary is the -- our representative with Supreme  
2 Manufacturing.

3 Q. And you mentioned that this was signed under  
4 coercion.

5 A. Yes.

6 Q. Can you describe that for us?

7 A. Yes. John contacted -- we were -- this was  
8 signed at the Mississippi -- or this agreement  
9 was made at the Mississippi trade show, if I'm  
10 not mistaken. And Grady and John met and  
11 discussed some things, then I was brought in  
12 at the end of the deal, I think. When they  
13 laid out the solution for -- for logical  
14 separation, prior to that arrangement, or  
15 prior to that meeting, Mr. Walker had called  
16 me and notified me that he had a booth at the  
17 Mississippi show and was going to be selling  
18 his Juice Alive product individually unless --  
19 and we also had a booth there -- and that  
20 unless we agreed to -- to start selling his  
21 product, that he would compete against us. We  
22 were already in extreme financial trouble. We  
23 had no sales force. Our -- John had

1 abandoned -- or John had not been selling in  
2 our business for quite some time, and we were  
3 essentially on our last leg financially.

4 And we had -- we felt like we  
5 had no choice at this point in time but to  
6 cooperate with John so that we could join  
7 forces and sell -- it was the only chance we  
8 were going to have to -- only chance we had of  
9 making it financially, we felt like at the  
10 time, was to submit to this coercive behavior.

11 You know, either you -- which  
12 was presented to us, either you buy our  
13 product, or I'm competing against you, and  
14 I'll put you out of business. Because as John  
15 is our salesperson to all of our contacts at  
16 that time, John was still -- John was all our  
17 contacts knew of US Beverage. And our -- like  
18 any other sales thing, it's a relationship.  
19 There's not necessarily a loyalty to the  
20 company; there's a loyalty to the  
21 relationship. And we had absolutely no choice  
22 at the time but to sign it or go out of  
23 business.

1 Q. Well, why didn't you go to court and ask for  
2 an injunction?

3 A. Well, you're an attorney. You know that would  
4 be ridiculous, two or three days before the --  
5 before the show. We had neither the time nor  
6 the money to do that.

7 Q. You filed a lawsuit approximately six months  
8 later, didn't you?

9 A. That wasn't going to help us at the show.

10 Q. Did you consult an attorney before you signed  
11 this?

12 MR. GILL: Object to the form.

13 A. No.

14 Q. Well, any other form of coercion, anything  
15 else that -- other than what you've described,  
16 that you're alleging?

17 A. For that agreement right there?

18 Q. Yes.

19 A. Oh, sure. Coercion since -- since the very  
20 beginning. That summer when -- or the -- in  
21 the May, I believe, of that year, John came to  
22 us and said, I've got several accounts that I  
23 can sell, but quite frankly, I don't feel like

1 I should turn these over unless we can come to  
2 some agreement about the buyout. And once  
3 again, the record will show extreme financial  
4 problems due to a lot of things, but certainly  
5 a sales effort that had no robustness about it  
6 at all.

7 And then there was in April of  
8 the -- I believe April of this year at the  
9 trade show, at the Alabama trade show, we had  
10 signed this agreement and were paying the 1.20  
11 and doing what we were supposed to do trying  
12 to work out an agreement. John comes to me  
13 again at the trade show and says that, I've  
14 just had lunch with your competitor, and he's  
15 willing to pay more for the product. If  
16 you're not willing to pay more for it and do  
17 certain things, I will compete against you; I  
18 will sell to them, and I will put you out of  
19 business.

20 Q. Okay. So you -- and I'm sorry. Are you  
21 telling -- I'm asking you about coercion that  
22 you allege led you to sign this document dated  
23 November 18th, 2005 --

1 testimony that -- that the decision by US  
2 Beverage to create the Fruzers brand occurred  
3 after US Beverage received a cease-and-desist  
4 lawyer -- letter from a lawyer representing  
5 John Walker?

6 A. Yes.

7 Q. Was that the only reason that US Beverage  
8 decided just to create the Fruzers brand?

9 A. No. Our -- we began thinking about it after  
10 we were giving an -- we were given an  
11 ultimatum after the Alabama trade show to  
12 either start paying extremely high prices for  
13 what we were receiving -- as a matter of fact,  
14 at the show, John said, I've been holding back  
15 on you, which was -- I could give you more,  
16 but I have not done so -- which was  
17 reminiscent of Cool Tropics -- and more  
18 coercive behavior, we started looking at the  
19 possibilities -- doing an exploration of what  
20 it would cost and what it would take to form a  
21 brand, but it wasn't until we were given a  
22 cease-and-desist letter that we decided to --  
23 that that was what we would do as a company.

1 A. It starts -- the only thing I know it starts  
2 with is when we have the money to do it, that  
3 we would do it. And that's my -- that's my  
4 recollection.

5 Q. Okay. Again, I'm just trying to understand,  
6 but you --

7 A. Mr. Jackson, the understanding is, we had just  
8 purchased a little over a hundred and  
9 something thousand, I believe, of Juice Alive.  
10 And after we received our -- few days, while  
11 our last purchase was on its way, received a  
12 cease-and-desist notice from somebody  
13 representing Juice Alive. And I felt that it  
14 was -- it put us in a desperate situation  
15 because we were going into bidding season, and  
16 our -- for the schools, and this was some of  
17 the knowledge that Mr. Walker had of our  
18 business. He knew that we -- I believe that  
19 he knew that we needed -- we all knew we  
20 needed a brand for the business. And I've got  
21 a cease-and-desist letter, and I've got bids  
22 I've got to put a brand name on, and I asked  
23 my buddy to help me out and that we'd work the



1 details out down the road. We talked about a  
2 lot of things, but we have nothing set -- we  
3 have nothing set in stone.

4 Q. You say you've got a sliding scale based on  
5 volume?

6 A. That I proposed to him, yes, and I did not  
7 write it down.

8 Q. And what is your buddy's name again?

9 A. Carrie Bynum.

10 Q. Do you think Mr. Bynum could shed some light  
11 on what the -- this proposed sliding scale  
12 would be?

13 A. I'm sure he could.

14 Q. Has US Beverage trademarked the Fruzers name?

15 A. We've applied for the trademark.

16 Q. When was that applied for?

17 A. Sometime this past summer, I believe.

18 Q. When you say, you applied, you mean you  
19 applied with the US Patent and Trademark  
20 Office; correct?

21 A. Yes. And Carrie -- Carrie Bynum handled that  
22 for us on our behalf. He acquired the  
23 attorney and liaised that whole situation.

1           depositions it was noted that our competitors  
2           have not done particularly well against us in  
3           some areas, they have caused us to lower our  
4           bids.

5                               We bid against Juice Alive  
6           in -- in one bid in North Carolina, and it was  
7           very malicious the way that it was done.  
8           Juice Alive representatives posing -- or  
9           confusing the child nutrition people that they  
10          were -- that they were us and then switching  
11          the Juice Alive brand on them and then sending  
12          Dispensing Systems out there to bid it, forced  
13          us into -- once it was all fared out and we  
14          were given the opportunity to go into this  
15          particular buying group, the -- somebody  
16          representing Juice Alive said, well, we want  
17          to force this into a bid, and we were  
18          already -- we were at 59.94, so we went to --  
19          so we went into the bid. We bid 56.94, I  
20          believe, and our competitor bid \$86 knowing  
21          that the -- that we were already at 59.94.  
22          And then at the South Carolina show, they made  
23          mention of that, why did you-all bid so low on

1           that when you could have bid a lot more than  
2           that? I see that as malicious, and I really  
3           don't feel that since Mr. Walker is still  
4           benefiting every day from his association with  
5           US Beverage that he has the right to do that  
6           and he has the right to take the Juice Alive  
7           name, which is ours, to simply destroy our --  
8           to destroy our profitability, to confuse the  
9           marketplace, or to gain personally off of  
10          something that he created with -- as  
11          vice-president of sales, charged with the  
12          idea -- with the mission of creating a market  
13          for US Beverage products.

14       Q.     You just mentioned something I've never heard  
15              of before. Who is it you contend posed as a  
16              US Beverage employee in North Carolina?

17       A.     That, I don't know. I was told -- this is  
18              third-party information, but I was told by  
19              Buddy Todd when he called and tried to sell to  
20              one of these accounts -- and I would love for  
21              this to go on the record, quite honestly --  
22              that they had already made the decision to go  
23              with the company they met at the show. Buddy

1           reminded them that they hadn't met them at the  
2           show; they had met us. And they go, you know,  
3           that's right, but they spoke as though we had  
4           met them at the show, and they talked about  
5           the product as though we had met them at the  
6           show, but it was really US Beverage we met at  
7           the show; huh, I don't like that; okay, I'm  
8           going to tell them that I don't like the way  
9           they do business; I'm going to tell them they  
10          can't do it. So they give us -- they gave it  
11          to us at 59.94. But I think the records -- I  
12          mean, I'd be happy for you to speak to  
13          somebody about that, because I do think  
14          that's -- it raises your eyebrow; it raised  
15          mine. And I --

16       Q.       And you can't put it --

17       A.       If I were you, I wouldn't want you to do that  
18               because --

19       Q.       I didn't ask you the question because it  
20               raised any damn eyebrows. I asked you the  
21               question because I'm giving your deposition.

22                       MR. GILL: You don't need to argue  
23                       with him.

1 THE WITNESS: Okay.

2 A. As I stated earlier, to a significant number  
3 of our -- at the time of the -- or at the time  
4 that Mr. Walker started competing against  
5 himself, against US Beverage, to the line  
6 share of our business -- he was US Beverage.  
7 It's a relationship business, and it's not a  
8 loyalty to a -- it's not a loyalty to a brand  
9 as much as -- or a company as much it is a  
10 loyalty to the relationship.

11 Mr. Walker was receiving --  
12 Mr. Walker had prepared up to the time that  
13 he was no longer actively involved in the  
14 company, kept all of those contacts in a  
15 couple of forms on his -- you know, his  
16 computer at home, on his PDA thing, whatever  
17 that thing is called, in his phone, phone  
18 records, phone numbers, and he also received  
19 regular copies of our books, and he also  
20 prepared every one of our bids that I can  
21 recall. And so he had a -- very, very  
22 exponent knowledge since they all -- even at  
23 the show, Mississippi show, I presented John

1 still as our partner, believed that John was  
2 with US Beverage. And -- and as our single  
3 sales force, they wouldn't know anybody else  
4 but John. And John would know -- and John had  
5 every one of those contacts. He knows our  
6 prices, he knows what we pay for our product  
7 because he received a royalty on the 1.20  
8 agreement. Over and above our invoice price  
9 we invoiced, we sent him POs along with  
10 Supreme, so he knew exactly what we paid for  
11 the product; he knew how to structure our  
12 bids -- or he knew how we structured our bids  
13 because he had been doing the bidding, and he  
14 knew every -- John intimately, because he was  
15 our sales force through -- intimately to every  
16 facet of that side of the business.

17 Q. Any other type of proprietary knowledge other  
18 than what you've already listed?

19 A. He knew our financial position; he knew our  
20 debts, he knew our pay scales, he knew all of  
21 our employees. You know, in that -- he also  
22 used -- in developing the Juice Alive brand,  
23 used our resources and started developing

1 customers under the Juice Alive name that we  
2 didn't know about that we felt like were ours  
3 and did not have access to those. So John --  
4 John was US Beverage to our customers.  
5 That's...

6 Q. You mentioned bids, in preparing bids. Were  
7 these bids for public contracts?

8 A. Yes.

9 Q. Do you know if your bids would be public  
10 record?

11 A. Yes, our bids would be public record.

12 Q. What about the identity of your public  
13 clients, like your clients in school systems  
14 and so forth; is that information -- would  
15 that be publicly available?

16 A. Now, that, I don't know. Both our bid price  
17 and our -- and who our clients are, you can --  
18 if you owned the company, you could find that  
19 out in seconds. Just look at your books.  
20 We -- you have to work very, very hard at  
21 times to get bid prices and find out who those  
22 customers are without just driving to the  
23 location and looking to see who they are. But